

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

TIM M. HIER,)	
)	
Appellant,)	Case No 07SV-217
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE LANCASTER
LANCASTER COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Tim M. Hier ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on May 27, 2008, pursuant to an Order for Hearing and Notice of Hearing issued February 21, 2008. Commissioners Warnes, Salmon, Wickersham and Hotz were present. Commissioner Warnes was the presiding hearing officer.

Tim M. Hier was present. No one appeared as legal counsel for the Taxpayer.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

Was the County Board's decision upholding the County Assessor's disqualification of the land described in this appeal for special valuation unreasonable or arbitrary?

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as S 29 T7 R6, LOT 12 NW (20.65 ACRES), Lancaster County, Nebraska, ("the subject property").
3. The Taxpayer's application for the subject property to be qualified for use of special valuation was denied by the Lancaster County Assessor.
4. The Taxpayer protested that determination of disapproval to the County Board.
5. The County Board affirmed the determination of disapproval of the County Assessor.
6. An appeal of the County Board's decision was filed with the Commission.
7. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
8. An Order for Hearing and Notice of Hearing issued on February 21, 2008, set a hearing of the appeal for May 27, 2008, at 11:00 a.m. CDST.
9. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016 (7) (Supp 2007).
2. The Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land. Neb. Const. art. VIII, §1 (4).
3. For purposes of sections 77-1359 to 77-1363:
 - (1) Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure;
 - (2) Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:
 - (a) Land retained or protected for future agricultural or horticultural purposes under a

conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production;

(3) Farm home site means not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road; and

(4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site. Neb. Rev. Stat. §77-1359 (Cum. Supp. 2006).

4. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses. Neb. Const. art. VIII, §1 (5).
5. Agricultural or horticultural land which has an actual value as defined in section 77-112 reflecting purposes or uses other than agricultural or horticultural purposes or uses shall be assessed as provided in subsection (3) of section 77-201 if the land meets the qualifications of this subsection and an application for such special valuation is filed and approved pursuant to section 77-1345. In order for the land to qualify for special

valuation all of the following criteria shall be met: (a) The land is located outside the corporate boundaries of any sanitary and improvement district, city, or village except as provided in subsection (2) of this section; and (b) the land is agricultural or horticultural land. Neb. Rev. Stat. §77-1344 (1) (Supp. 2007).

6. The eligibility of land for the special valuation provisions is to be determined each year as of January 1, but if the land so qualified becomes disqualified on or before December 31 of that year, it shall be valued at its recapture value. Neb. Rev. Stat. §77-1344 (3).
7. Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel. Neb. Rev. Stat. §77-132 (Cum. Supp. 2006).
8. At any time, the county assessor may determine that land no longer qualifies for special valuation pursuant to sections 77-1344 and 77-1347. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).
9. If land is not deemed qualified, the county assessor shall send a written notice of the determination to the applicant or owner within thirty days after his or her determination, including the reason for the disqualification. Neb. Rev. Stat. §77-1347.01 (Supp 2007).
10. A protest of the county assessor's determination may be filed with the county board of equalization within thirty days after the mailing of the denial. Neb. Rev. Stat. §77-1345(3)(a) (Cum. Supp. 2006).

11. The county board of equalization shall decide the protest within thirty days after the filing of the protest. The county clerk shall, within seven days after the county board of equalization's final decision, mail to the protester written notification of the board's decision. Neb. Rev. Stat. §77-1347.01 (Supp. 2006).
12. The decision of the county board of equalization may be appealed to the Tax Equalization and Review Commission in accordance with section 77-5013 within thirty days after the date of the decision. Neb. Rev. Stat. §77-1345(9) (Cum. Supp. 2006).
13. The Statutes governing the Commission create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York Cty. Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003).
14. The presumption remains until there is competent evidence to the contrary presented. *Id.*
15. Competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).
16. The Taxpayer has a burden to adduce evidence that the decision, action, order, or determination appealed from was unreasonable or arbitrary as prescribed by statute. *City of York v. York County Bd. of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003)
17. The Commission may not grant relief unless it is shown that the action of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006),
18. Proof that the action of the County Board was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).

19. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."
Castellano v. Bitkower, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
20. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
21. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).

IV. ANALYSIS

The subject property is a 20.64 acre parcel, Exhibit 8 page 1, which has been improved with a 2 story single family residence. (E8:3). The parcel was purchased by the Taxpayer on January 1, 2004, and the residence was added in 2006. (E8:1). The Taxpayer has appealed the decision of the Lancaster County Board of Equalization denying greenbelt status to the subject property.

The Taxpayer testified that after purchase of the subject property he removed the residence which was present at the time of purchase and constructed a new residence in 2006 at a cost of \$250,000.

Only agricultural land and horticultural land as defined by the legislature is eligible for special valuation. Neb. Rev. Stat. §77-1344 (1) (Supp. 2007). The statutory definition of agricultural land and horticultural land contains various terms which are critical to an

understanding of the statute. The term “parcel” has been defined by Nebraska’s Legislature.

"Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel." Neb. Rev. Stat. §77-132 (Cum. Supp. 2006).

Other significant terms within the statutory definition of agricultural land and horticultural land have not been defined by the Legislature. The term “commercial production” has not been defined but only land used for the “commercial production” of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture, with exceptions noted above, may be agricultural land and horticultural land. The Commission has not found in statute or in Nebraska case law a definition of the term “commercial production.” Commercial can mean “of, in or relating to commerce.” *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002), p. 456. That definition without examination appears circular simply using the word commerce to define commercial.

Commerce may, however, be defined as “the exchange or buying or selling of commodities esp. on a large scale and involving transportation from place to place, compare trade, traffic. “ Id. Trade may mean “the business of buying and selling or bartering commodities: exchange of goods for convenience or profit: commerce.” Supra at p. 2421. Traffic may mean “a commercial activity usu. involving import and esprit trade, or to engage in

commercial activity: buy or sell regularly or the activity of exchanging commodities by bartering or buying and selling.” *Supra* at p. 2422-2423.

An alternate definition of the term commercial is “from the point of view of profit: having profit as the primary aim.” *Supra* at p. 456. A definition of the word commercial also appears in the rules and regulations of the Tax Commissioner. “Commercial shall mean all parcels of real property predominately used or intended to be used for commerce, trade, or business.” 350 Neb. Admin. Code, ch. 10, §001.05C (3/07). That definition is used for the classification of real property for assessment purposes. See, 350 Neb. Admin. Code, ch. 10, §004.02 B (3/07). The Property Tax Administrator has advised that commercial production means agricultural or horticultural products produced for the primary purpose of obtaining a monetary profit. Directive 07-01, Property Tax Administrator, (3/07).

Prior to adoption of amendments to the statute defining agricultural land and horticultural land in 2006, the definition of agricultural and horticultural land contained a requirement that the land be used for the “production” of agricultural products. Neb. Rev. Stat. §77-1359 (Reissue 2003). The new term “commercial production” did not appear in the definition. *Id.* A statute should be construed to give effect to purposeful change in its provisions. A construction of “commercial production” to mean production with the intent to make a profit gives effect to the change in terminology as adopted by the legislature and is adopted by the Commission. The Commission finds that a critical element to understanding the term commercial production is its construction as requiring the intent to make a profit and not whether a profit was in fact made.

It is appropriate to consider a number of factors to determine whether or not an activity is undertaken with a view to making a profit. See, *Wood*, 548 T.M., *Hobby Losses*. Among the

factors to be considered are: whether the activity is conducted in a business like manner with adequate records and adaption of operating methods to changing circumstances; expertise of the Taxpayer, if any, necessary for conduct of the operation; consultation with experts, if necessary, and reliance on appraisals or other data for decision making as necessary; time and effort expended by the Taxpayer in furtherance of the operation; any expectation of appreciation in the assets employed in the operation; success the Taxpayer has had in carrying on similar or dissimilar operations; the Taxpayer's history of profits or losses with respect to the operation discounting startup losses and losses or gains due to unusual circumstances; any profits earned and the possibility of profits if none have been earned to date; the Taxpayer's financial status i.e. the ability to sustain losses or incur costs without regard to returns; and elements of personal pleasure or recreation, or other motives other than profit or gain. The same factors are relevant to a determination of whether commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture ("commercial production") has occurred on the parcel.

The Taxpayer testified that the subject property, less the area on which the house was built (also containing two pole sheds and a two acre pond) was used for the growing of brome grass for hay. His testimony was that there were 17 acres of land on the parcel on which brome grass was grown. In addition, his testimony was that he had one cow on the subject property on January 1, 2007. In October, 2007, he sold 1 ½ sides of beef in the amount of \$600. (E11:4). The income received by the Taxpayer in 2006 for the sale of hay was a total of \$650. (E11:6 and 8). The Taxpayer testified that he had a pleasure horse on the subject property as of January 1, 2007.

The Taxpayer testified that he had expenses associated with the hay and cattle business. The Taxpayer did not provide evidence of expenses associated with the purchasing or the raising of the cattle nor did he testify about his intent to make a profit from the raising of cattle. Those expenses shown on Exhibit 11 page 5, \$173.17, were testified to by the Taxpayer as being for repairs of the pole sheds. Exhibit 11, page 7, is a receipt for the purchase of a tractor, \$7,252, which he used to maintain the subject property.

The Taxpayer testified that he did not file a schedule reporting agricultural income with his federal income tax return. His testimony was that he included this agricultural income and expenses with his plumbing business. The Commission finds that the Taxpayer could not know whether a profit was being made or what actions should be taken to make a profit unless records showing both income and expenses were kept.

Based on the Taxpayer's use of the subject property the Commission concludes that the requirement for commercial production on the parcel has not been met.

Based on the Taxpayer's testimony and evidence presented, the Commission finds that the requirement for commercial production on the parcel has not been met. The lack of commercial production on the subject property removes the land thereon from consideration for special valuation as the land does not qualify as agricultural or horticultural in accordance with the requirement of Neb. Rev. Stat. §77-1344 (1) (Supp. 2007). Further analysis is not required to determine if the subject property is primarily used for agricultural and horticultural purposes.

The Commission finds that the Taxpayer has not provided clear and convincing evidence that the County Board's denial of greenbelt status to the subject property was arbitrary or unreasonable. The appeal of the Taxpayer is denied.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not adduced competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property was not eligible for special valuation is affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Supp. 2007).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this proceeding.
5. This decision shall only be applicable to tax year 2007.

6. This order is effective for purposes of appeal on October 16, 2008.

Signed and Sealed. October 16, 2008.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result. I do not find that commercial production of agricultural products occurred on the subject property as of January 1, 2007, the qualification date. If commercial production is not found it is unnecessary to discuss the primary use of the subject property .

The evidence is that brome grass hay has been produced on the subject property and sold during the year 2006. In 2006 the brome grass hay proceeds were \$650.00. (E11:6 & 8). In addition the Taxpayer feeds 1 or 2 cattle for slaughter. In 2007 1½ sides of beef were sold for \$600. (E11:4). One of the cattle to be fed and sold was on the subject property as of January 1, 2007. There is no evidence of beef sales in 2006.

Limited expense information was provided. A major expense was the purchase of a tractor in 2006. (E11:7). A minor expense was repairs to a pole shed. (E11:5). There are two pole sheds on the subject property. One pole shed is used to store the tractor and perhaps other

machinery. One pole shed is used as a barn and stable for the cattle being fed and the pleasure horse kept on the subject property by the Taxpayer. Costs that are unknown are the costs of baling hay for sale; cost of acquiring, feeding, growing and slaughter of the cattle, real estate taxes attributable to the land and improvements used for agricultural or horticultural production, costs of operating the tractor and depreciation of the pole barns and equipment. The Taxpayer testified that income and expenses of the subject property were included on a business tax return but that return was not provided. The records furnished to the Commission as noted were at best incomplete. It seems clear that a person could not know whether a profit was being made or actions to take to make a profit unless records showing both income and expenses were kept. The intent to make a profit can be shown by record keeping. In addition the Taxpayer testified that hay production on the subject property was solely based on weather. The Taxpayer did not indicate that he had any knowledge of methods to increase the production of brome grass hay or that he had sought any advice in that regard. What has been shown in this case is production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture aquaculture, or horticulture but that production is not “commercial production” as required by law.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general the

Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of the Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York* has roots in the early jurisprudence of Nebraska. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.*

In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the district Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016 requires a finding that the decision being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence presented to the Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp. 2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to district courts review of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is de novo on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). As noted however review was de novo and the reviewing court was not bound by the standard of review imposed on district court. *Loskill v. Board of Equalization of*

Adams County, 186 Neb. 707, 185 N.W.2d 852 (1971). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for the district courts; one statutory, and the other judicial stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not therefore allow a grant of relief even though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, one remaining after the other has been met. See. *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The burden of proof to overcome the presumption is competent evidence. *City of York*, Supra. Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of

equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York, Supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted. Each analyses of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* analysis requires the Commission to consider all of the evidence

produced in order to determine whether there is clear and convincing evidence that the decision, action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

William R. Wickersham, Commissioner